# Mohd Azam Shuja & Ors v United Malayan Banking Corporation Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO B-04-12-94
ZAKARIA YATIM, NH CHAN AND SITI NORMA YAAKOB JJCA
2 MAY 1995

***Civil Procedure*** *— Pleadings — Alternative prayers for striking out and summary judgment in same application — Whether proper — Whether court can dictate which application is to be heard — Whether choice should be made by applicant*

***Civil Procedure*** *— Appeal — Grounds of appeal — Whether Court of Appeal confined to grounds stated in memorandum of appeal — Whether can consider point not raised in court below — Court of Appeal Rules 1994 O 18*

***Tort*** *— Negligence — Professional negligence — Solicitors — Negligently advising bank to release loan when charge could not be registered due to third party caveat — Loan credited to borrower's current account to reduce existing overdraft — Whether negligence had caused loss since overdraft was unsecured debt already owed by borrower*

***Banking*** *— Banker and client — Overdraft account — Loan released upon negligent advice of solicitors — Charge not registered due to third party caveat — Loan used to reduce overdraft — Whether loss suffered since overdraft was unsecured debt already owed*

The respondent sued the appellants as advocates and solicitors for alleged professional negligence in respect of a loan granted by the respondent to Denson & Co ('the company'). The appellants advised the respondent that the property to be charged to the respondent was free from encumbrances. Acting upon the advice of the appellants, the respondent released a loan of RM60,000 to the company. Subsequently, the appellants informed the respondent that the said property was caveated and not free from incumbrances. The respondent alleged that it had suffered loss and damage by reason of the negligence and claimed the sum of RM60,000 with interest and costs. The respondent's application prayed for an order that the statement of defence be struck out under O 14 r 21 of the Subordinate Courts Rules 1980 ('the SCR') and under the inherent jurisdiction of the court on the grounds that it disclosed no reasonable defence, was frivolous and vexatious and an abuse of the process of the court. The application also contained an alternative prayer for an order that the respondent be at liberty to enter summary judgment under O 26A of the SCR. The sessions court allowed the application for summary judgment. The appellants appealed to the High Court, arguing that no loss had been suffered by the respondent as the loan had been credited to the current account of the company to reduce its overdraft,

thereby converting its unsecured debt to a secured debt. The judge dismissed the appeal but reduced the judgment sum and interest as conceded by the respondent. [See [1995] 1 MLJ 33.] The appellants appealed to the Court of Appeal. At the commencement of the hearing, the court inquired whether it was proper for the respondent to pray for an order to strike out the statement of defence and alternatively for summary judgment in the same application.

**Held**, allowing the appeal:

(1) (Per **Zakaria Yatim JCA**) The Court of Appeal has the power to raise an issue which was not raised in the court below or in the memorandum of appeal and need not confine itself to the grounds set forth in the memorandum of appeal as O 18 of the Court of Appeal Rules 1994 clearly states this. The question whether effect should be given to a point raised for the first time in the appellate court is one of discretion and the court can consider it in the interests of justice.

(2) (Per **Zakaria Yatim JCA**) A plaintiff cannot proceed with both prayers for striking out and summary judgment in one application because, firstly, in an application for striking out under O 26A of the SCR, no defence need be filed, whereas in an application for summary judgment under O 14 r 21 of the SCR, there must be a statement of defence, and secondly, in an O 26A application, the court has to decide whether there are triable issues which ought to be tried. Where there are two such prayers in one application, the court ought to proceed with the application for summary judgment and not with the striking out application.

(3) (Per **Zakaria Yatim JCA**) The High Court judge overlooked the fact that the charge could not be registered because of the caveat. If the appellant had notified the respondent about the caveat before the transaction, the respondent would not have carried on with the transaction, in which case, there was still the unsecured debt owing to the respondent by the company.

Cases referred to

*Asia Life Assurance Society Ltd v Kong Leong Aik* [1992] 4 CLJ 2053 (folld)

*Bakti Saujana (M) Sdn Bhd v Energoprojekt Engineering and Contracting Co* (Civil Suit No D4-22-1359-1991) (unreported) (folld)

*Connecticut Fire Insurance Co v Kavanagh* [1892] AC 473 (folld)

*Dummer v Brown* [1953] 1 QB 710; [1953] 1 All ER 1158; [1953] 2 WLR 984 (distd)

*Gulwant Singh v Abdul Khalik* [1965] 2 MLJ 55 (folld)

*Letchumi & Anor v Asia Insurance Co Ltd* [1972] 2 MLJ 105 (folld)

*Wagon Engineering Sdn Bhd v Sulaiman Buloh Semenanjung Enterprise Sdn Bhd* [1988] 2 CLJ 861 (folld)

(4) (Per **NH Chan** and **Siti Norma Yaakob JJCA**) Where there are two applications in one summons-in-chambers, the party applying has to elect as to which application he wishes to proceed on. In all civil proceedings, the court has no power to dictate to a litigant what form of application he should make or what kind of order he should apply for.

Cases referred to

*Bakti Saujana (M) Sdn Bhd v Energoprojekt Engineering and Contracting Co* (Civil Suit No D4-22-1359-1991) (unreported) (not folld)

*Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433; (1987) 4 PCC 691; [1987] 1 WLR 413 (folld)

*Wagon Engineering Sdn Bhd v Sulaiman Buloh Semenanjung Enterprise Sdn Bhd* [1988] 2 CLJ 861 (folld)

**[Bahasa Malaysia summary**

Responden telah mendakwa perayu untuk kecuaian profesional sebagai peguamcara dan peguambela berkenaan dengan suatu pinjaman yang diberikan oleh responden kepada Denson & Co ('syarikat itu'). Perayu telah menasihatkan responden bahawa hartanah yang akan digadaikan kepada responden adalah bebas daripada bebanan. Responden telah bertindak atas nasihat perayu dan melepaskan suatu pinjaman sebanyak RM60,000 kepada syarikat itu. Kemudiannya, perayu telah memberitahu responden bahawa hartanah tersebut telah dikaveatkan dan tidak bebas daripada bebanan. Responden mengata bahawa ia telah mengalami kerugian dan kerosakan akibat kecuaian itu dan menuntut jumlah RM60,000 dengan faedah dan kos. Permohonan responden telah memohon untuk suatu perintah supaya pernyataan pembelaan dibatalkan di bawah A 14 k 21 Kaedah-Kaedah Mahkamah Rendah 1980 ('KMR') dan di bawah bidang kuasa sedia ada mahkamah atas dasar bahawa ia tidak mendedahkan sebarang pembelaan yang munasabah, adalah remeh dan menyusahkan dan suatu penyalahgunaan proses mahkamah. Permohonan itu juga mengandungi suatu permohonan alternatif untuk suatu perintah supaya responden dibenarkan mencatatkan penghakiman muktamad di bawah A 26A KMR. Mahkamah sesyen telah membenarkan permohonan untuk penghakiman terus itu. Perayu telah membuat rayuan kepada Mahkamah Tinggi, dan berhujah bahawa responden tidak mengalami sebarang kerugian kerana pinjaman itu telah dikreditkan ke dalam akaun semasa syarikat itu untuk mengurangkan pinjaman overdrafnya, dan dengan demikian menukarkan hutang tak bercagarnya kepada suatu hutang bercagar. Hakim itu telah menolak

rayuan tersebut tetapi mengurangkan jumlah penghakiman dan faedah seperti yang diakui oleh responden. [Lihat [1995] 1 MLJ 33.] Perayu telah membuat rayuan kepada Mahkamah Rayuan. Pada permulaan pembicaraan, mahkamah telah menanya sama ada ianya adalah betul apabila responden memohon untuk suatu perintah membatalkan pernyataan pembelaan dan secara alternatif untuk penghakiman terus di dalam permohonan yang sama.

**Diputuskan**, membenarkan rayuan itu:

(1) (Oleh **Zakaria Yatim HMR**) Mahkamah Rayuan mempunyai kuasa untuk menimbulkan suatu isu yang tidak ditimbulkan di mahkamah di bawah atau di dalam memorandum rayuan dan tidak semestinya menghadkan dirinya kepada alasan yang dinyatakan di dalam memorandum rayuan kerana A 18 Kaedah-Kaedah Mahkamah Rayuan 1980 dengan jelas menyatakan ini. Soalan sama ada pertimbangan harus diberikan kepada suatu perkara yang ditimbulkan untuk kali pertamanya di mahkamah rayuan adalah suatu soalan budi bicara dan mahkamah boleh mempertimbangkannya demi kepentingan keadilan.

(2) (Oleh **Zakaria Yatim HMR**) Seseorang plaintif tidak boleh meneruskan permohonannya untuk kedua-dua pembatalan dan penghakiman terus di dalam suatu permohonan kerana, pertamanya, di dalam suatu permohonan untuk pembatalan di bawah A 26A KMR, suatu pembelaan tidak perlu difailkan, manakala di dalam suatu permohonan untuk penghakiman terus di bawah A 14 k 21 KMR, mesti terdapat suatu pernyataan pembelaan, dan keduanya, di dalam suatu permohonan di bawah O 26A application, mahkamah mesti memutuskan sama ada terdapat isu perlu bicara yang harus dibicarakan. Di mana terdapat dua permohonan sedemikian di dalam satu permohonan, mahkamah sepatutnya meneruskan dengan permohonan untuk penghakiman terus dan bukannya dengan permohonan untuk pembatalan.

(3) (Oleh **Zakaria Yatim HMR**) Hakikat bahawa gadaian itu tidak dapat didaftarkan kerana adanya kaveat tersebut telah terlepas perhatian hakim Mahkamah Tinggi. Jika perayu telah memberitahu responden tentang kaveat itu sebelum transaksi tersebut, responden tidak akan meneruskan transaksi itu, dan di dalam keadaan demikian, masih akan terdapat hutang tak bercagar yang dihutang oleh syarikat itu kepada responden.

(4) (Oleh **NH Chan HMR** dan **Siti Norma Yaakob HMR**) Di mana terdapat dua permohonan di dalam satu saman dalam kamar, pihak yang memohon mesti membuat pilihan tentang permohonan yang mana beliau ingin meneruskan. Di dalam semua prosiding sivil, mahkamah tidak mempunyai kuasa untuk memerintahkan bentuk permohonan yang seseorang litigan itu patut buat atau jenis perintah beliau patut memohon.]

**Notes**

For cases on appeals, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 259–699.

For cases on professional negligence, see 12 *Mallal's Digest* (4th Ed) paras 357–375; [1989] Mallal's Digest 1498, 1507; [1990] Mallal's Digest 1180–1181, 1195; [1991] Mallal's Digest 1963; [1992] Mallal's Digest 1653; [1993] Mallal's Digest 1289–1290.

**Complete list of cases referred to**

*Asia Life Assurance Society Ltd v Kong Leong Aik* [1992] 4 CLJ 2053

*Bakti Saujana (M) Sdn Bhd v Energoprojekt Engineering and Contracting Co* (Civil Suit No D4–22–1359–1991) (unreported)

*Connecticut Fire Insurance Co v Kavanagh* [1892] AC 473

*Dummer v Brown* [1953] 1 QB 710; [1953] 1 All ER 1158; [1953] 2 WLR 984

*Gulwant Singh v Abdul Khalik* [1965] 2 MLJ 55

*Letchumi & Anor v Asia Insurance Co Ltd* [1972] 2 MLJ 105

*Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433; (1987) 4 PCC 691; [1987] 1 WLR 413

*Wagon Engineering Sdn Bhd v Sulaiman Buloh Semenanjung Enterprise Sdn Bhd* [1988] 2 CLJ 861

**Legislation referred to**

Court of Appeal Rules 1994 O 18 rr 1, 2

Rules of the High Court 1980 O 14, O 18 r 19

Subordinate Courts Rules 1980 O 14 r 21, O 26A

**Appeal from**: Civil Appeal No 12–21–1991 (High Court, Shah Alam)

*WSW Davidson* (*Paul Kwong* with him) (*Azman Davidson & Co*) for the appellants.

*Sujata Varatharaju* (*Ong Kok Bin & Co*) for the respondent.

*Cur Adv Vult*

**Zakaria Yatim JCA**: On 14 October 1988, the plaintiff filed a suit in the Sessions Court, Klang against the five defendants who are advocates and solicitors of the High Court Malaya for alleged professional negligence. In the statement of claim, the plaintiff alleged that on 27 February 1987, it retained the defendants to act as its solicitors in the legal documentation in respect of a loan granted to a company known as Denson & Co. On 27 June 1987, the defendants advised the plaintiff that the loan documentation had been completed and that the property to be charged to the plaintiff was free from encumbrances. The defendants also told the plaintiff that the charge was duly presented for registration. Acting upon the advice of the defendants, the plaintiff, on 3 July 1987 released a loan

of RM60,000 to the company. On 8 July 1987, the defendants informed the plaintiff that the said property was caveated and not free from incumbrances. The plaintiff said that it had suffered loss and damage by reason of the negligence. The plaintiff's claim against the defendants was for a sum of RM60,000 with interest in the sum of RM6,859.40 together with further interest at the rate of 11%pa on monthly rests from 1 June 1988 till the date of realization and costs. The defendants filed their statement of defence on 18 April 1989.

On 19 February 1990, the plaintiff filed an application for an order that the statement of defence be struck out under O 14 r 21 of the Subordinate Courts Rules 1980 ('the SCR') and under the inherent jurisdiction of the court on the grounds that the defence disclosed no reasonable defence, that it was frivolous and vexatious and that it was an abuse of the process of the court. The same application also contained an alternative prayer for an order that the plaintiff be at liberty to enter final judgment as prayed in the statement of claim against all the defendants under O 26A of the SCR.

On 7 January 1991, the learned sessions court judge, after hearing both counsel for the plaintiff and for the defendants, made an order striking out the statement of defence under O 14 r 12 and entered judgment against the defendants as prayed in the statement of claim with costs. The said order is reproduced below:

> Atas permohonan plaintif di hadapan Yang Arif Tuan Hassan bin Abd Rahman, hakim Mahkamah Sesyen, Klang dan setelah membaca notis permohonan bertarikh 19 Februari 1990 dan setelah mendengar En Zainal Abiddin bin Mohd Zainuddin bagi pihak plaintif dan Cik Wan Linda bagi pihak defendan pada 22 November 1990, adalah diperintahkan bahawa pernyataan pembelaan defendan menurut A 14 k 12, Kaedah Mahkamah Rendah dan seterusnya plaintif diberi kebebasan untuk memasuki penghakiman terhadap defendan pertama, kedua, ketiga, keempat dan kelima serta faedah dan kos sebagaimana yang ternyata di dalam pernyataan tuntutan dan selanjutnya diperintahkan bahawa kos permohonan ini hendaklah ditanggung oleh defendan pertama, kedua, ketiga, keempat dan kelima.
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> Bertarikh pada 7 Januari 1991.

The defendants appealed to the High Court. The learned judge dismissed the appeal but reduced the judgment sum and interest as conceded by the plaintiff. With the leave of this court, the defendants appealed to this court against the decision of the learned judge.

At the commencement of the hearing of the appeal before this court, we were of the view that counsel should address us whether it was proper for the plaintiff to include a prayer to strike out the statement of defence and an alternative prayer for summary judgment. Since this was not an issue in the appeal we adjourned the hearing to the next day to enable both counsel to address the court on this point.

When the hearing resumed the next day, Mr WSW Davidson, counsel for the appellants, conceded that the issue was not raised by the defence in

A the court below. He confirmed that in the memorandum of appeal the appellants did not make any reference to this issue. He submitted however that this court has the discretion to raise the issue under O 18 rr 1 and 2 of the Court of Appeal Rules 1994 even though the point was not raised in the court below.

B Ms V Sujata, counsel for the respondent, submitted that the appellants had not taken the point whether or not it was proper for the plaintiff to include in one application a prayer for striking out and a prayer for summary judgment. She said that the sessions court judge dealt with the plaintiff's application on both grounds. On appeal to the High Court, the learned judge, however dealt with the matter as a summary judgment C application. Ms Sujata further submitted that the defendants did not object to the plaintiff's application and there was therefore no election. The issue was not raised in the High Court. She contended that it was not proper for this issue to be brought up now. When asked by the court to produce an authority to support her contention, she said, 'I don't have D authority'.

I think this court has the power to raise the issue before going into the merits of the appeal. Although this issue was not raised in the court below or in the memorandum of appeal, this court need not confine itself to the grounds set forth in the memorandum of appeal in the circumstances of the present case. Order 18 clearly states:

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(1) The appellant shall prepare a memorandum of appeal setting forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, and specifying the points of law or fact which are alleged to have been wrongly decided; such grounds to be numbered consecutively.

F (2) The appellant shall not without the leave of the Court put forward any other ground of objection, but the Court in deciding the appeal shall not be confined to the grounds set forth by the appellant.

The question of whether effect should be given to a point not raised in the court below but raised for the first time in the appellate court is one of G discretion. This was decided by the Federal Court in *Gulwant Singh v Abdul Khalik* [1965] 2 MLJ 55. The principles on which the discretion may be exercised have been laid down in *Connecticut Fire Insurance Co v Kavanagh* [1892] AC 473. Lord Watson, in his judgment at p 480 said:

> When a question of law is raised for the first time in a court of last resort, H upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea. The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact, in considering which the court of ultimate review is placed in a much less advantageous position than the courts below. I But their Lordships have no hesitation in holding that the course ought not, in any case, to be followed, unless the court is satisfied that the evidence upon which they are asked to decide established beyond doubt that the facts, if fully investigated, would have supported the new plea.

In *Letchumi & Anor v Asia Insurance Co Ltd* [1972] 2 MLJ 105, a new point was raised by the appellants in the Federal Court. The point raised the question whether there was a subsequent ratification by the insured. The Federal Court decided that although the point regarding ratification was not raised before the trial judge, the appellate court would consider it in the interests of justice.

It is to be noted that in *Gulwant Singh v Abdul Khalik* and *Letchumi v Asia Insurance Co*, one of the parties raised the point which was not raised in the court below. In my view, the principles laid down in the cases cited above apply to the present case. This court, therefore, can consider the issue in the interest of justice.

Mr Davidson referred to three High Court decisions which have dealt with the issue. The cases are *Wagon Engineering Sdn Bhd v Sulaiman Buloh Semenanjung Enterprise Sdn Bhd* [1988] 2 CLJ 861; *Asia Life Assurance Society Ltd v Kong Leong Aik* [1992] 4 CLJ 2053; and *Bakti Saujana (M) Sdn Bhd v Energoprojekt Engineering and Contracting Co* (Civil Suit No D4–22–1359–1991) (unreported). He submitted that all the three decisions were the same. No decision was opposite to the other.

Ms Sujata referred to the following passage in the judgment of Siti Norma Yaakob J, as she then was, in *Wagon Engineering*:

> At the outset, I need to point out that it is very important that the plaintiff should state categorically under which Order or Rule of the Rules of the High Court that it is proceeding with, so as to give the defendant due notice of the nature of the application to enable it to direct its mind as to the issues that are really in dispute. The plaintiff should elect whether it wished to proceed under O 18 r 19 or under O 14, but it cannot proceed with both.

It is to be noted that the passage quoted above was followed by Haidar J in *Asia Life Assurance*. At p 2055, the learned judge said:

> No doubt it is a matter in the appellant's discretion to proceed either under O 14 r 12 or O 26A of [the] SCR but I do not think the appellant could proceed on both.

I entirely agree with Siti Norma Yaakob J and Haidar J that a plaintiff cannot proceed with both prayers for striking out and for summary judgment in one application. The reasons are obvious. Firstly, under O 26A of the SCR the primary emphasis is on the affidavit. No defence need be filed. In an application under O 14 r 21 of the SCR, there must be a statement of defence. Secondly, in an application under O 26A, the court has to decide whether there are triable issues which ought to be tried.

In the present case, since there were two such prayers in one application, the sessions court ought to have proceeded with the application for summary judgment and not with the striking out application. See *Bakti Saujana*. In the High Court, the learned judge treated the matter as an application for summary judgment.

I propose to deal here with the respondent's application for summary judgment. As already stated, the respondent's claim against the appellants

A was for professional negligence. In the statement of claim the respondent claimed damages in the liquidated sum of RM66,859.40. This sum was in fact the amount due and owing from Denson & Co to the respondent. Mr Davidson contended that prior to 3 July 1987 when the loan was released to Denson & Co on the security of the charge, the latter was already indebted to the respondent in the sum of RM57,987.04. This was the balance of an unsecured overdraft facility granted by the respondent to Denson & Co earlier. Therefore, in reality no substantial moneys had moved from the respondent to Denson & Co. There was only an alteration of book entries to show that Denson & Co's existing debt was transferred to another account to reflect that its unsecured overdraft of RM57,987,54 had been converted into a secured facility of RM60,000. By this arrangement, no money was in fact released to Denson & Co except perhaps the difference between the RM60,000 and the RM57,987.54 which is RM2,012.46. If the appellants had discovered the caveat, the respondent would have been left to recover for Denson & Co an unsecured overdraft of RM57,987.54. After the transaction, the respondent was left to recover an unsecured debt of RM60,000. The respondent's loss as a result of the negligence was RM2,012.46. The appellants had already paid the respondent a sum of RM996.

The learned sessions court judge, however entered judgment for the respondent in the sum of RM66,859.40 together with interest at the rate of 11%pa from 1 June 1988 till the date of realization and costs of RM5,420.50.

In my view, on the facts of this case, if the learned sessions court judge was inclined to enter judgment against the appellants, his order should be an interlocutory judgment for damages to be assessed.

The learned High Court judge, in his grounds of judgment (see [1995] 1 MLJ 33) asked the question: '... did the bank suffer loss? If so how much was the loss?'. At p 37, the learned judge said:

> The loan that was advanced was supposed to have been secured against a charge on the property and had been released on the negligent advice of the solicitors that the charge had been duly presented for registration. If the charge had been registered, the bank would have been entitled to recover the loan amount by the sale of the said property under s 256 of the National Land Code 1965 and this was surely the recoverable loss which could have been reasonably foreseen by the solicitors.

With respect, the learned judge overlooked the fact that the charge could never be registered because of the caveat. If the appellant had notified the respondent about the caveat before the transaction, the respondent would not have carried on with the transaction. If the respondent did not carry out the transaction there was still the unsecured debt of RM57,987.54 owing to the respondent by Denson & Co.

The learned judge concluded that the respondent was entitled to summary judgment for the sum of RM60,000 less RM996. He also varied the rate of interest on the decreased amount at 11%pa from the date the

loan was released to the date of judgment in the sessions court and thereafter at the rate of 8%pa to the date of realization. In arriving at his conclusion he relied on *Dummer v Brown* [1953] 1 QB 710; [1953] 1 All ER 1158; [1953] 2 WLR 984. But in that case, the English Court of Appeal confirmed the decision of McNair J who gave leave to the plaintiff to sign judgment against the defendants for damages to be assessed.

For the reasons stated above, I agreed that the appeal be allowed with costs here and below. Deposit to be returned to the appellants. The judgment sum together with interest which had been paid to the respondent be refunded to the appellants.

**NH Chan JCA**: I have had the advantage of reading the judgment of my Lord Zakaria Yatim JCA in draft with which I agree save for the point on what is the proper course to take when the summons-in-chambers contains an application for striking out a pleading as well as an application for summary judgment.

Since it is the judgment of this court that a party cannot proceed on both applications together, that is to say, for striking out a pleading and for summary judgment in the same summons in chambers (the reasons for which are stated in the judgment of my Lord Zakaria Yatim JCA in this appeal, and I agree with him on this), the question then is which one of the orders sought for ought to be proceeded with or should the summons be dismissed altogether. Faced with such a situation, Siti Norma Yaakob J, as she then was, in *Wagon Engineering Sdn Bhd v Sulaiman Buloh Semenanjung Enterprise Sdn Bhd* [1988] 2 CLJ 861, took the view that the party applying has to make an election as to which application the party wishes to make.

In the unreported case of *Bakti Saujana (M) Sdn Bhd v Energoprojekt Engineering and Contracting Co* (Civil Suit No D4–22–1359–1991), the registrar at first instance chose to proceed on the O 14 application instead of on the alternative application under O 18 r 19 of the Rules of the High Court 1980. On appeal to the judge in chambers, counsel for the applicant also chose to proceed on the O 14 application. There Zakaria Yatim J, as he then was, dealt with it as an application for summary judgment. He said:

> For the reasons I have just stated and since Ms Selva was not relying on O 18 r 19, I ruled that I would hear only the appeal in respect of the application for summary judgment.
>
> I shall now consider the application for summary judgment under O 14.

However, in the course of his judgment, the judge observed:

> In my view, it is not proper for the plaintiff to include the two prayers in one application even though the prayers are in the alternative. Where there is a prayer for summary judgment under O 14, it is not for the plaintiff to decide on which prayer he elects to proceed with. In my opinion the court has to

proceed with the O 14 application provided that the affidavit in support of the application is in conformity with the Rules of the High Court.

In the instant case, the sessions judge had allowed both applications of the plaintiff, namely, to strike out the defence under O 14 r 21 as well as for summary judgment under O 26A of the Subordinate Courts Rules 1980 against the defendants. But, when the matter went on appeal to the High Court, the judge dealt with it as an application for summary judgment.

In my judgment, I think that where there are two such applications in one summons-in-chambers, even though the applications are in the alternative (which, incidentally, means one or the other), the party applying has to elect as to which application he wishes to proceed on. This is because that since both the applications are the applicants' and since it has been determined by this court in the present appeal that the two applications could not be proceeded on in the same summons in chambers, the summons would be dismissed unless the applicant elects as to which of the two applications he would wish to proceed on.

In *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433; (1987) 4 PCC 691; [1987] 1 WLR 413, Lord Templeman, giving the judgment of the Privy Council (Lord Bridge, Lord Fraser, Lord Templeman, Lord Griffiths and Lord Ackner) said ([1987] 1 MLJ 433 at p 436; (1987) 4 PCC 691 at p 696; [1987] 1 WLR 413 at p 418): 'In civil proceedings the trial judge has no power to dictate to a litigant what evidence he should tender.'

Just as a trial judge has no power to dictate to a litigant what evidence he should tender, in all civil proceedings the court has no power to dictate to a litigant what form of application he should make or what kind of order he should apply for. In the same way, just as 'the court cannot give a direction about evidence unless one of the litigants desires such direction to be made' (per Lord Templeman [1987] 1 MLJ 433 at p 436; (1987) 4 PCC 691 at pp 696–697; [1987] 1 WLR 413 at p 418), the court also cannot give a direction as to which one of the applications (if there are more than one) the litigant, who is applying, should choose to apply for an order on. Of course, a judge may indicate to the applicant that unless he elects as to which application he is applying for an order on, his summons-in-chambers is likely to fail. Since it is the applicant who is applying to the court for an order, he has to decide for himself which is the one he is asking for an order on, otherwise, the summons in chambers will be dismissed because the applicant cannot proceed on both applications together.

**Siti Norma Yaakob JCA**: I have had the opportunity of reading the draft judgments of my brothers, Zakaria Yatim and NH Chan JJCA, and I concur with the reasoning of the decision stated by Zakaria Yatim JCA, save and except that part of his judgment relating to the issue as to the procedure to be followed when a plaintiff decides to seek two prayers in the alternative in one application.

In this case, the respondent in the sessions court applied for the appellants' statement of defence to be struck out under O 14 r 21 of the Subordinate Courts Rules 1980 ('the SCR') and under the inherent jurisdiction of the court. The same application also contained an alternative prayer for summary judgment under O 26A of the SCR.

In this respect, I concur with the procedure adopted by my brother, NH Chan JCA, and for the reasons given that the respondent must elect which of the alternative prayers it wishes to proceed with before its application can be heard on its merits.

*Order accordingly.*

Reported by Anne Khoo